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IN THE
Supreme Court of the United States
 OCTOBER TERM, 1995

CAMPS NEWFOUND/OWATONNA, INC.,
Petitioner,
 v.

TOWN OF HARRISON, *et al.*,
Respondents.

On Writ of Certiorari to the
 Maine Supreme Judicial Court

**BRIEF OF THE AMERICAN COUNCIL ON
 EDUCATION, INDEPENDENT SECTOR, AMERICAN
 ASSOCIATION OF MUSEUMS, AMERICAN HEART
 ASSOCIATION, CENTER FOR NON-PROFIT
 CORPORATIONS, COUNCIL FOR ADVANCEMENT
 AND SUPPORT OF EDUCATION, DELAWARE
 ASSOCIATION OF NONPROFIT AGENCIES, MAINE
 ASSOCIATION OF NONPROFITS, NATIONAL
 ASSOCIATION OF INDEPENDENT COLLEGES AND
 UNIVERSITIES, NATIONAL ASSOCIATION OF
 INDEPENDENT SCHOOLS, NATIONAL COUNCIL OF
 NONPROFIT ASSOCIATIONS, NATIONAL EASTER
 SEAL SOCIETY, NATIONAL MULTIPLE SCLEROSIS
 SOCIETY, NONPROFIT COORDINATING COMMITTEE
 OF NEW YORK, UNITED WAY OF AMERICA, AND
 YMCA OF THE USA AS *AMICI CURIAE*
 IN SUPPORT OF PETITIONER**

CARTER G. PHILLIPS
 NATHAN C. SHEERS
 MARISA A. GÓMEZ
 SIDLEY & AUSTIN
 1722 Eye Street, N.W.
 Washington, D.C. 20006
 (202) 736-8000

SHELDON ELLIOT STEINBACH *
 AMERICAN COUNCIL
 ON EDUCATION
 One Dupont Circle, N.W.
 Washington, D.C. 20036-1193
 (202) 939-9355

Counsel for Amici Curiae

May 10, 1996

* Counsel of Record

[Additional Counsel Listed on Inside Cover]

3114

AMERICAN ASSOCIATION
OF MUSEUMS
1225 Eye Street, N.W.
Suite 200
Washington, D.C. 20005
(202) 289-1818

AMERICAN HEART ASSOCIATION
7272 Greenville Avenue
Dallas, TX 75231-4596
(214) 373-6300

CENTER FOR NON-PROFIT
CORPORATIONS
15 Roszel Road
Princeton, N.J. 08540
(609) 951-0800

COUNCIL FOR ADVANCEMENT AND
SUPPORT OF EDUCATION
11 Dupont Circle, N.W.
Suite 400
Washington, D.C. 20036
(202) 328-5900

DELAWARE ASSOCIATION OF
NONPROFIT AGENCIES
100 W. 10th Street
Suite 102
Wilmington, DE 19801
(302) 777-5500

MAINE ASSOCIATION OF
NONPROFITS
565 Congress
Suite 301
Portland, ME 04101
(207) 871-1885

NATIONAL ASSOCIATION OF
INDEPENDENT COLLEGES
AND UNIVERSITIES
1025 Connecticut Avenue
Suite 700
Washington, D.C. 20036
(202) 785-8866

NATIONAL ASSOCIATION OF
INDEPENDENT SCHOOLS
1620 L Street, N.W.
Washington, D.C. 20036-5605
(202) 973-9700

NATIONAL COUNCIL OF
NONPROFIT ASSOCIATIONS
1001 Connecticut Ave., N.W.
Suite 900
Washington, D.C. 20036
(202) 833-5740

NATIONAL EASTER SEAL SOCIETY
230 W. Monroe
Chicago, IL 60606
(312) 726-6200

NONPROFIT COORDINATING
COMMITTEE OF NEW YORK
121 Avenue of the Americas
New York, NY 10013-1510
(212) 925-5340

YMCA OF THE USA
101 N. Wacker Drive
Chicago, IL 60606
(312) 977-0031

ADAM YARMOLINSKY
INDEPENDENT SECTOR
1828 L Street, N.W.
Suite 1200
Washington, D.C. 20036
(202) 223-8100

SUSAN B. HARRIS
NATIONAL MULTIPLE
SCLEROSIS SOCIETY
733 3rd Avenue
New York, NY 10017
(212) 986-3240

CHARLES E. M. KOLB
UNITED WAY OF AMERICA
701 N. Fairfax Street
Alexandria, VA 22314
(703) 836-7100

QUESTION PRESENTED

Whether a Maine statute, Me. Rev. Stat. Ann. tit. 36, § 652(1)(A)(1), violates the Commerce Clause because it deprives "benevolent and charitable" nonprofit institutions of otherwise available property tax exemptions if they are "conducted or operated principally for the benefit of persons who are not residents of Maine."

SUMMARY OF ARGUMENT

ARGUMENT

1. NOTICE THAT LEGISLATION THAT
IS ENACTED IN OR SUBSTANTIALLY
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IS SUBJECT TO THE COMMERCE CLAUSE
WHEN IT PLAYS A SIGNIFICANT PART
IN THE ECONOMIC LIFE OF THE
COUNTRY.
2. THE COMMERCE CLAUSE DOES NOT
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LAW THAT AFFECTS INTERSTATE
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3. THE COMMERCE CLAUSE DOES NOT
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<i>Chemical Waste Mgmt., Inc. v. Hunt</i> , 504 U.S. 334 (1992)	16
<i>City of Philadelphia v. New Jersey</i> , 437 U.S. 617 (1978)	10, 14, 16
<i>Edwards v. California</i> , 314 U.S. 160 (1941)	20
<i>Fort Gratiot Sanitary Landfill, Inc. v. Michigan Dep't of Natural Resources</i> , 504 U.S. 353 (1992)	10, 16
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<i>Goldfarb v. Virginia State Bar</i> , 421 U.S. 773 (1975)	9, 10, 14
<i>Heart of Atlanta Motel, Inc. v. United States</i> , 379 (1961) 142 S. Ct.	20
<i>Hughes v. Oklahoma</i> , 441 U.S. 322 (1979)	14
<i>NCAA v. Board of Regents of the Univ. of Okla.</i> , 468 U.S. 85 (1984)	13
<i>National Geographic Soc'y v. California Bd. of Equalization</i> , 430 U.S. 551 (1977)	15
<i>Polish Nat'l Alliance v. NLRB</i> , 322 U.S. 643 (1944)	9, 10, 13
<i>United States v. Lopez</i> , 115 S. Ct. 1624 (1995)	19, 20
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OTHER AUTHORITIES	
Jon Anderson, <i>Art Institute Exhibit Brought Out Color of Monet</i> , Chi. Trib., Dec. 7, 1995, at 1....	17
Avner Ben-Ner, <i>Who Benefits from the Nonprofit Sector?: Reforming Law and Policy Towards Nonprofit Organizations</i> , 104 Yale L.J. 731 (1994)	18, 19

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<i>Biosphere, Columbia University Form Science Consortium</i> , Associated Press, Aug. 14, 1994, available in WESTLAW, Allnews Database	17
Derek Bok, <i>What's Wrong with Our Universities?</i> , 14 Harv. J.L. & Pub. Pol'y 305 (1991)	17
<i>A Consortia of Universities, Businesses and Non-Profit Organizations</i> , Env't Wk., July 9, 1992....	17
Charles T. Clotfelter, <i>The Distributional Consequences of Nonprofit Activities, in Who Benefits From the Nonprofit Sector?</i> 1 (Charles T. Clotfelter ed., 1992)	19, 20, 21
Henry B. Hansmann, <i>The Role of Nonprofit Enterprise</i> , 89 Yale L.J. 835 (1980)	17, 18, 19
Henry B. Hansmann, <i>The Two Nonprofit Sectors: Fee for Service Versus Donative Organizations, in The Future of the Nonprofit Sector</i> 91 (Virginia A. Hodgkinson et al. eds., 1989)	21
Virginia A. Hodgkinson et al., <i>Nonprofit Almanac 1992-1993: Dimensions of the Independent Sector</i>	19, 21
<i>Independent Sector, America's Independent Sector in Brief</i> (1996)	19, 21
<i>Independent Sector, Why Tax Exemption? The Public Service Role of America's Independent Sector</i> (1993)	18
Peter D. Lambert, <i>University Consortium Signs Onto Telstar</i> , Broadcasting & Cable, Dec. 21, 1992, at 47	16
Evelyn A. Lewis, <i>When Entrepreneurs of Commercial Nonprofits Divorce: Is It Anybody's Business? A Perspective on Individual Property Rights in Nonprofits</i> , 73 N.C. L. Rev. 1761 (1995)	17, 18, 21
Leah Marcus, <i>Summer School Is a Hot Topic</i> , Chi. Sun-Times, May 2, 1995, at 3	18
<i>MarketPlace Aviation Classes Broadcast by Satellite to Four Colleges</i> , 313 Aviation Daily 498 (1993)	16
National Center for Education Statistics, <i>Digest of Education Statistics 1995</i>	16

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<i>Prepared Testimony of Dr. Arden L. Bement, Director Midwest Superconductivity Consortium, Fed. News Serv., Feb. 29, 1996, available in WESTLAW, Allnews Database</i>	17
Gabriel Rudney, <i>The Scope and Dimensions of Nonprofit Activity, in The Nonprofit Sector: A Research Handbook</i> 55 (Walter W. Powell ed., 1987)	18, 19, 21
Jerald Schiff & Burton Weisbrod, <i>Competition Between For-Profit and Nonprofit Organizations in Commercial Markets, in The Nonprofit Sector in the Mixed Economy</i> 127 (Avner Ben-Ner & Benedetto Gui eds., 1993)	21
John G. Simon, <i>The Tax Treatment of Nonprofit Organizations: A Review of Federal and State Policies, in The Nonprofit Sector: A Research Handbook</i> 67 (Walter W. Powell ed., 1987)	22
Edward J. Skloot, <i>Enterprise and Commerce in Nonprofit Organizations, in The Nonprofit Sector: A Research Handbook</i> 380 (Walter W. Powell ed., 1987)	17
Richard Steinberg, <i>Nonprofit Organizations and the Market, in The Nonprofit Sector: A Research Handbook</i> 118 (Walter W. Powell ed., 1987)	21
<i>Who Benefits from the Nonprofit Sector?</i> (Charles T. Clotfelter ed., 1992)	18

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INTERESTS OF AMICI CURIAE

The American Council on Education ("ACE") is the nation's major coordinating body in postsecondary education. Founded in 1918, ACE is a voluntary membership organization comprised of more than 1,800 institutions of higher education from both the public and private sectors and more than 175 nonprofit educational associations and organizations. As an association representing the interests of most of the nation's nonprofit higher education institutions and organizations, ACE is uniquely qualified to present the views of such nonprofit institutions in legal matters of national importance which affect their financial interests and mission priorities.

The Independent Sector ("IS") is a nonprofit organization which seeks to ensure the continuance of a healthy, independent nonprofit sector. Founded in 1980 by a merger of the Coalition of National Voluntary Organizations and the National Council on Philanthropy, IS's membership is made up of over 800 not-for-profit corporations, foundations, and voluntary organizations. Because of IS's extensive and well-respected research on the not-for-profit sector and the great diversity of its membership, it is uniquely positioned to speak to the concerns and financial interests of not-for-profit organizations generally.

The American Association of Museums ("AAM") is a nonprofit organization dedicated to promoting excellence within the museum community. Founded in 1906, AAM is the only organization representing the entire scope of museums as well as the professionals and nonpaid staff who work for and with museums. AAM counts among its more than 14,000 members art, history, science, military, maritime, college, university, and youth museums; art associations and centers; historic houses and societies; preservation projects; zoos; planetariums; aquariums; botanical gardens; arboretums; libraries; and science and technology centers. AAM is particularly concerned by this case because many of its members currently are develop-

ing programs and events which are intended to draw a large amount of cultural tourism from other states and countries.

The American Heart Association ("AHA") is a nonprofit voluntary health agency dedicated to reducing disability and death from cardiovascular diseases and stroke. Founded in 1924, the AHA represents more than four million volunteers. The AHA and its 53 affiliates support research, education, and community service programs nationwide. In addition, the AHA ships a number of its publications and licenses many products across state lines.

The Center for Non-Profit Corporations (the "Center") is a charitable umbrella organization representing and serving New Jersey's charities through advocacy, public policy, legal and management consultation, research, and education. Founded in 1982, the Center has over 600 nonprofit members statewide, some of which operate outside the State of New Jersey as well. The Center is dedicated to building the power of the nonprofit sector to improve the quality of life for the people of New Jersey. The Center's mission is based upon the belief that all nonprofits, regardless of which state's citizens those organizations primarily benefit, are important parts of a vital sector which strengthens society as a whole, and that New Jerseyans benefit in countless ways from the presence and work of a strong, vibrant nonprofit community, whether programs or services are provided within the state or elsewhere.

The Council for the Advancement and Support of Education ("CASE") is a nonprofit organization which represents the interests of more than 2,900 public and private colleges and universities, independent elementary and secondary schools, other education-related nonprofit organizations, and commercial firms in the fields of philanthropy, communications, and alumni administration. Founded in 1974 through a merger of the American Alumni Council and the American College Public Rela-

tions Association, CASE provides its services to members across state lines, helps its members solicit funds across state lines, and acts as a national clearinghouse for corporate matching gift information. Moreover, many of CASE's nonprofit members have a substantial number of out-of-state students and alumni.

The Delaware Association of Nonprofit Agencies ("DANA") is a nonprofit association committed to increase the effectiveness of nonprofits located in Delaware. Founded in 1986, its members include more than 235 charitable organizations statewide who provide a number of valuable services both inside and outside of the State of Delaware. DANA is concerned that the effectiveness of a number of its members who operate outside the State of Delaware and Delaware nonprofits as a whole could be affected by the Court's decision here.

The Maine Association of Nonprofits (the "Association") is a nonprofit organization dedicated to advancing and promoting the entire nonprofit sector in the State of Maine. To this end, the Association provides its members with training, education, services, and products designed to aid Maine nonprofits in performing their missions. Founded in 1994, the Association has over 200 nonprofit members and 40 commercial supporters. The nonprofit members of the Association provide a wide variety of services, including health, environmental, and cultural services. These services may be provided across state lines or carried out in association with a national nonprofit organization. Moreover, the Association is concerned that the nonprofit sector of Maine as a whole may suffer should the decision below be allowed to stand.

The National Association of Independent Colleges and Universities ("NAICU") is the nation's primary advocate for private higher education. Founded in 1976 by college and university presidents, working together with representatives of state associations of independent colleges and universities, NAICU currently represents more than 875 private, nonprofit colleges and universities nation-

wide. The 1,600 independent colleges and universities in the United States enroll 2.9 million students, many of them from states other than the state in which the particular independent college or university is located. Independent colleges and universities often solicit funds from donors across state lines as well.

The National Association of Independent Schools ("NAIS"), a nonprofit organization, is the nation's institutional advocate for independent precollegiate education institutions that are primarily supported by tuition, charitable contributions, and endowment income. Founded in 1962 through a merger of the Independent Schools Education Board and the National Council of Independent Schools, the over 1,100 accredited nonprofit members of NAIS include day and boarding schools as well as coed and single-sex schools, each with a distinct mission and an independent board of trustees. Many of NAIS's member schools, most particularly boarding schools, currently serve a sizeable number of out-of-state students. In addition, in many large metropolitan areas—such as Maryland, Virginia, and the District of Columbia, and New York, New Jersey, and Connecticut—day students commute across state lines to attend member schools. NAIS is particularly concerned that in order to maintain their state tax exemptions, member boarding schools will be forced to limit the number of out-of-state students accepted for admission, thereby decreasing the schools' geographic diversity and limiting the educational opportunities available to out-of-state residents.

The National Council of Nonprofit Associations ("NCNA"), founded in 1989, is a charitable organization whose mission is to advance the vital role and capacity of the nonprofit sector in civil society. To accomplish this mission, the NCNA supports and gives voice to state and regional associations of community-based organizations and other nonprofits. Its membership includes over 30 statewide and regional associations of nonprofit organizations. A number of the organizations who are

members of its member associations, as well as the associations themselves, may provide a wide variety of necessary nonprofit services across state lines or be associated with a national organization. The NCNA is concerned that its members, as well as the nonprofit sector as a whole, may be impacted greatly by the Court's decision in this case.

The National Easter Seal Society ("NESS") is a nationwide nonprofit organization which seeks to help people with disabilities achieve independence. Founded in 1919, the NESS provides quality rehabilitation services, technological assistance, and disability prevention, advocacy, and education programs. The NESS has over 135 affiliated societies as members who operate nearly 500 sites, providing necessary services to the communities where they are located. These societies serve one million children and adults with disabilities and their families nationwide, often across state lines. Moreover, the NESS itself serves its societies and members across the United States.

The National Multiple Sclerosis Society ("NMSS"), a nonprofit voluntary health organization founded in 1946, is the nation's most comprehensive resource on multiple sclerosis and related topics. Through its national office and its 50-state network of 135 chapters and branches, the NMSS serves some half-a-million people across the nation annually. The NMSS and its affiliates fund research, provide services, encourage education, and promote public policy development and advocacy on multiple sclerosis issues across state and national borders. This year alone the NMSS spent more than \$14 million to support research nationally and internationally.

The Nonprofit Coordinating Committee of New York ("NPCC") is a nonprofit organization that works to improve the political, regulatory, and economic infrastructure that is needed for the 19,500 nonprofits located in the New York City metropolitan area to advance their missions effectively. Founded in 1984, the NPCC's

membership is comprised of over 725 nonprofit members working in the fields of social services, religion, philanthropy, the arts, health care, education, and public policy research, often across state lines. If forced to provide services only within state boundaries, the NPCC fears that a number of its members may not be able to advance their missions effectively.

The United Way of America ("United Way"), founded in 1918, is a national service and training center providing resources, technical assistance, corporate relations, research, and government relations to approximately 2,000 community-based United Way organizations. Apart from government, United Ways support the greatest variety of health and human services in the country, helping to provide such crucial services as disaster relief, emergency food and shelter, job training, crisis intervention, day care, physical rehabilitation, and youth development. The United Way provides services to its community-based United Ways across the nation.

The YMCA of the USA is a nonprofit corporation whose members are the more than 950 local corporate YMCAs which serve over 14 million Americans each year. YMCAs have been building body, mind, and spirit since 1851. They are America's largest nonprofit provider of school-age child care. Hundreds of thousands of children and young people participate in YMCA youth sports, aquatic programs, outreach programs, and camps. And YMCAs continue to be the national leader in providing community-based health and fitness programs for adults of all ages. Many YMCAs serve people who are not residents of the state where the YMCA facility is physically located. Several YMCAs near state borders have service areas that include parts of two, or even three, states. In addition, many of the more than 300 YMCA residential summer camps draw young people from more than one state. Moreover, some YMCA residence programs serve runaway youth or other transient, nonresident

homeless populations. The Armed Services YMCAs and YMCAs located near military bases also serve substantial numbers of people who are not residents of the state where the YMCA is located.

In the decision under review by this Court, the Maine Supreme Judicial Court held that the State's denial of property tax exemptions to nonprofit institutions "in fact conducted or operated principally for [the benefit of] persons who are not residents of Maine" did not violate the Commerce Clause. Pet. App. at 2a (quoting Me. Rev. Stat. Ann. tit. 36, § 652(1)(A)(1) (West Supp. 1994)). *Amici* have an acute concern in this case. Respondents have urged the Court to adopt the position that Maine's tax exemption statute does not violate the Commerce Clause because "[t]he purpose and effect of tax exemptions for nonprofit *vis-a-vis* for-profit organizations is of key importance" to the determination of whether Maine's denial of the exemption to certain nonprofits discriminates against interstate commerce. Opp. at 9.

Amici Curiae and their member not-for-profit organizations have a special and profound interest in tax exemptions and support the position of petitioner Camps Newfound/Owatonna in urging reversal of the judgment of the Maine Supreme Judicial Court. If allowed to stand, the decision below poses a substantial threat to the financial welfare of nonprofit institutions generally. States following Maine's lead could force educational institutions and other nonprofits to forgo otherwise available tax exemptions simply because they primarily benefit out-of-state residents.

It is the position of *Amici* that states cannot discriminatorily exclude not-for-profit organizations providing benefits across state lines from otherwise available tax exemptions without violating the Commerce Clause. *Amici* in support of petitioner will not reiterate the manner in which laws discriminating against interstate com-

merce violate the Commerce Clause under this Court's precedents. Rather, *Amici* wish to present their views concerning whether not-for-profit institutions engage in or substantially affect interstate commerce and are therefore entitled to the protections of the Commerce Clause. *Amici* also wish to assist the Court in understanding the harmful effects the decision below will have on nonprofits and the national economy if allowed to stand. *Amici* believe that their distinct perspective and insight on these issues will materially assist the Court in deciding this case.¹

SUMMARY OF ARGUMENT

This Court has applied the term "interstate commerce" to for-profit and not-for-profit businesses alike and the Court has explicitly recognized that financial motivation alone does not prevent a business from being engaged in or from affecting interstate commerce. Addressing questions arising under the National Labor Relations Act, the Court recognized that the National Labor Relations Board's power to regulate employers, a delegation exercised pursuant to Congress's power to regulate "interstate commerce," encompassed nonprofit institutions. *Polish Nat'l Alliance v. NLRB*, 322 U.S. 643, 648 (1944); *Associated Press v. NLRB*, 301 U.S. 103, 128-29 (1937). This Court similarly has held that nonprofit entities are subject to antitrust liability under the Sherman Act. *Goldfarb v. Virginia State Bar*, 421 U.S. 773, 787-88 (1975). The effect of not-for-profit entities on "interstate commerce" is no different under the Commerce Clause when it is dormant.

In fact, the Court has recognized that the meaning of "interstate commerce" is no different when the Court is applying the Commerce Clause in its dormant state than

¹ Pursuant to Rule 8.3 of the Rules of this Court, the parties have consented to the filing of this brief. The parties' letters of consent have been filed with the Clerk of the Court.

when it is determining whether a matter falls within the ambit of congressional authority. *City of Philadelphia v. New Jersey*, 437 U.S. 617, 621 (1978). Accordingly, the Court's rulings interpreting the sweep of Congress's power under the Commerce Clause inform what "interstate commerce" is when the Commerce Clause is dormant. While the Court has not directly addressed whether nonprofit organizations fall within the protections of the Commerce Clause in its dormancy, it has held expressly that such organizations fall within Congress's power to regulate under the Commerce Clause. See, e.g., *American Soc'y of Mechanical Eng'rs, Inc. v. Hydrolevel Corp.*, 456 U.S. 556, 570 (1982); *Goldfarb*, 421 U.S. at 787-88; *Polish Nat'l Alliance*, 322 U.S. at 648; *Associated Press*, 301 U.S. at 128.

This Court has recognized explicitly that an activity's status as being in the stream of interstate commerce does not depend on the transmission of "value." In cases involving the transportation of wastes, the Court has held that solid waste can be interstate commerce despite the fact that the waste itself has no commercial value. See, e.g., *Fort Gratiot Sanitary Landfill, Inc. v. Michigan Dep't of Natural Resources*, 504 U.S. 353, 359 (1992). Moreover, even if the question as to whether an activity constitutes "interstate commerce" depended on providing "value," nonprofit organizations readily satisfy that requirement. They provide a number of important educational, research, health, social, religious, artistic, and cultural services that are not provided by for-profit institutions or governments. Nonprofit institutions account for a significant share of the nation's economic activity.

Even if the Court were to conclude that nonprofit businesses do not directly engage in interstate commerce, nonprofit institutions manifestly "affect" interstate commerce in a substantial way. Nonprofit organizations both use and provide goods and services in the stream of interstate commerce. Nonprofit organizations provide industry codes and standards as well as information and advice,

affecting the policies and economic viability of other government, for-profit, and not-for-profit entities. In addition, nonprofit organizations employ a substantial number of individuals nationwide. Nonprofit organizations, moreover, compete among themselves for donations and other forms of financial support, or, in the case of colleges and universities, students.

Far from having only an incidental effect on interstate commerce, the discriminatory law Maine has crafted will make it difficult for not-for-profit institutions to continue to provide their goods and services across state lines and will disadvantage those nonprofits that operate on a national or global basis. In today's environment of scarce direct public funding, not-for-profits depend heavily on tax exemptions and donations. Under the decision of the Maine Supreme Judicial Court, interstate nonprofits will no longer receive tax exemptions and will be forced to pass their increased costs along to their customers and beneficiaries or else provide fewer goods or services—simply because they do not operate for monetary gain and are therefore not entitled to the constitutional protections afforded for-profit organizations similarly operating in the stream of interstate commerce. This discrimination is precisely the kind of economic protectionism proscribed by the Commerce Clause. See *Fulton Corp. v. Faulkner*, 116 S. Ct. 848, 853-54 (1996).

If the decision below is allowed to stand, its ultimate effects will be far reaching. Nonprofit institutions that have beneficiaries in more than one state may be denied the same tax treatment as local institutions, detrimentally affecting their financial health. If other states follow Maine's lead, interstate nonprofit organizations may soon be treated differently for a wide variety of state and local government purposes. Such a result not only will severely undermine the financial strength of these organizations, but also will seriously endanger the future viability of nationally coordinated nonprofit institutions.

ARGUMENT

I. NOT-FOR-PROFIT ORGANIZATIONS THAT ARE ENGAGED IN OR SUBSTANTIALLY AFFECT INTERSTATE COMMERCE ARE PROTECTED BY THE COMMERCE CLAUSE WHEN APPLIED IN ITS DORMANT STATE.

The Maine Supreme Judicial Court below held that Maine's tax exemption statute limiting exemptions to those nonprofit organizations that principally benefit Maine residents did not violate the Commerce Clause.² In support of the decision below, respondents argue that it is permissible to treat nonprofit organizations dissimilarly and less favorably than for-profit organizations. This argument is refuted by two constitutional principles enunciated by this Court. First, Article I, Section 8 of the Constitution encompasses not-for-profit organizations. Second, the protections of the Commerce Clause in its dormant state are coextensive with the ambit of Congress's authority to regulate interstate commerce.

A. This Court Previously Has Held That Not-For-Profits May Engage In Or Substantially Affect Interstate Commerce And May Therefore Be Subject To Congressional Regulation Under The Commerce Clause.

This Court has held that Congress's power to regulate under the Commerce Clause extends to nonprofit organizations that are engaged in or substantially affect commerce. In *Associated Press v. NLRB*, 301 U.S. 103 (1937), the Court found that the Associated Press, a nonprofit newsgathering agency with divisions across the country, was engaged in interstate commerce within the meaning of the Commerce Clause and the National Labor Relations

² The Commerce Clause provides: "The Congress shall have Power To regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes." U.S. Const. art. I, § 8, cl. 3.

Act. *Id.* at 128. In reaching its conclusion, the Court stated the nonprofit's operations "involve[d] the constant use of channels of interstate and foreign communication." *Id.* The Court held that because of their business nature the Associated Press's activities constituted "commercial intercourse" within the meaning of the Commerce Clause. *Id.* The Court specifically noted that "[t]his conclusion is unaffected by the fact that [the Associated Press] does not sell news and does not operate for profit." *Id.* at 128-29.

Similarly, in *Polish National Alliance v. NLRB*, 322 U.S. 643 (1944), the Court recognized that Congress also has the power to regulate nonprofit organizations that "affect" interstate commerce. Specifically, the Court found that where a nonprofit fraternal organization arranged for and required its members to buy insurance across state lines, its labor practices affected interstate commerce and thus fell within the jurisdiction of the National Labor Relations Board, the agency to which Congress had delegated its Commerce Clause power. *Id.* at 648. Thus, under the Commerce Clause, Congress has the authority to regulate nonprofits affecting interstate commerce.

In accordance with these principles, the Court also has found that the American Society of Mechanical Engineers, a nonprofit membership corporation, "wields great power in the Nation's economy," providing codes and standards affecting the economic viability of a wide variety of businesses. *American Soc'y of Mechanical Eng'rs, Inc. v. Hydrolevel Corp.*, 456 U.S. 556, 570 (1982). The Court held that "the fact that ASME is a nonprofit organization does not weaken the force" of applicable antitrust laws passed pursuant to Congress's authority under the Commerce Clause. *Id.* at 576; see also *NCAA v. Board of Regents of the Univ. of Okla.*, 468 U.S. 85, 100 n.22 (1984) ("There is no doubt that the sweeping language

of § 1 [of the Sherman Act] applies to nonprofit entities"). Likewise, in *Goldfarb v. Virginia State Bar*, 421 U.S. 773 (1975), the Court held that the standardized billing rates set by a voluntary nonprofit bar association for the express purpose of eliminating "competition" for essential legal services substantially affected interstate commerce. *Id.* at 786. "[T]he activities of lawyers play an important part in commercial intercourse." *Id.* at 788. Thus, this Court has held that nonprofit organizations are subject to federal antitrust liability even though they do not operate for profit.

B. The Definition Of "Interstate Commerce" Used To Measure The Scope Of Congress's Power Under The Commerce Clause Applies In The Same Way When The Clause Is Dormant.

This Court has clearly held that the definition of "interstate commerce" does not change with the particular application of the Commerce Clause. In *City of Philadelphia v. New Jersey*, this Court rejected a state's assertion that the term "commerce" had a "'much more confined . . . reach'" under the "dormant" or "negative" Commerce Clause. 437 U.S. 617, 621 (1978). The Court found that the state court erred in assuming that "a two-tiered definition of commerce" was required. *Id.* at 622. The Court held that, if Congress has the power to regulate an article or activity of interstate commerce, states are not free from constitutional scrutiny when they attempt to regulate the article or activity. See also *Hughes v. Oklahoma*, 441 U.S. 322, 326 n.2 (1979).

The concept of "interstate commerce" incorporated in the negative application of the Commerce Clause is derived from the positive application of the Commerce Clause. *Associated Indus. v. Lohman*, 114 S. Ct. 1815, 1820 (1994). As this Court explained, the Commerce Clause "also embodies a negative command forbidding the States to discriminate against interstate trade." *Id.*

Articles and activities this Court has found to be "interstate commerce," and thus within Congress's regulatory power under the positive application of the Commerce Clause, also receive the protections against discriminatory regulation by the states embodied in the negative application of the Commerce Clause.

As discussed above, the Court consistently has found that nonprofit entities may be engaged in or substantially affect commerce. Nonprofit entities are not excluded from the reach of the Commerce Clause merely because of the nonprofit nature of their interstate commercial activities. Because the definition of "interstate commerce" is the same under both the positive and negative applications of the Commerce Clause, nonprofit entities are not excluded from the protections of the Commerce Clause against state discrimination. *Cf. National Geographic Soc'y v. California Bd. of Equalization*, 430 U.S. 551, 555 (1977) (applying Commerce Clause in dormant state to nonprofit organization in determining whether state had sufficient nexus to impose tax collection obligation on out-of-state seller).

C. Nonprofit Organizations May Engage In Interstate Commerce Under The Commerce Clause In Its Dormant State.

The question of whether nonprofits are engaged in or substantially affect interstate commerce does not depend on whether the organizations transmit goods and services which are conceived to be of a certain monetary value or provide their goods or services only in order to receive a certain amount of monetary value in return. The Court's rulings in cases involving the interstate transportation of wastes and the restrictions various states attempted to impose are dispositive here. In those cases, this Court directly addressed the argument that waste does not involve value and therefore does not constitute commerce protected by the dormant Commerce Clause. In each of

these cases, the Court rejected the argument that the nature of interstate commerce depends on commercial value. *C & A Carbone, Inc. v. Town of Clarkstown*, 114 S. Ct. 1677, 1682 (1994); *Fort Gratiot Sanitary Landfill, Inc. v. Michigan Dep't of Natural Resources*, 504 U.S. 353, 359 (1992); *Chemical Waste Mgmt., Inc. v. Hunt*, 504 U.S. 334, 340 n.3 (1992); *City of Philadelphia*, 437 U.S. at 622-23.

Instead, this Court has held that "[a]ll objects of interstate trade merit Commerce Clause protection; none is excluded by definition at the outset." *City of Philadelphia*, 437 U.S. at 622 (emphasis added). Whether the articles in question are considered "valueless" by the regulating state simply is irrelevant to the constitutional analysis. *Id.* The relevant inquiry is whether the article or activity in question is an article or activity of interstate commerce or substantially affects interstate commerce.

Nonprofit organizations manifestly provide goods and services which constitute or substantially affect interstate commerce. Nonprofit higher education institutions, for example, often provide education to a substantial number of students who travel across state borders to attend these universities and colleges. See National Center for Education Statistics, *Digest of Education Statistics 1995*, at 204; Pet. at 14 n.32. In fact, over 15% of the new students of educational institutions nationwide come from states other than the state in which the educational institution is located. National Center for Education Statistics, *supra*, at 204. Private nonprofit institutions often have an even larger percentage of out-of-state students. See, e.g., Pet. at 14 n.32. Classes may even be transmitted across state borders. See Peter D. Lambert, *University Consortium Signs Onto Telstar*, *Broadcasting & Cable*, Dec. 21, 1992, at 47; *MarketPlace Aviation Classes Broadcast by Satellite to Four Colleges*, 313 *Aviation Daily* 498 (1993). Universities and colleges also exchange information, books, and staff across state borders. Consortiums have been

formed which bring together educational institutions and industry or other nonprofit organizations in many states and have influence nationwide as well as globally. See Derek Bok, *What's Wrong with Our Universities?*, 14 Harv. J.L. & Pub. Pol'y 305, 329-30 (1991); see also *Biosphere, Columbia University Form Science Consortium*, Associated Press, Aug. 14, 1994, available in WESTLAW, Allnews Database; *A Consortia of Universities, Businesses and Non-Profit Organizations*, *Env't Wk.*, July 9, 1992; *Prepared Testimony of Dr. Arden L. Bement, Director Midwest Superconductivity Consortium*, *Fed. News Serv.*, Feb. 29, 1996, available in WESTLAW, Allnews Database. Professors of universities and colleges often consult with industry or government outside the state in which the colleges or universities with which they are associated are located. Bok, *supra*, at 320.

Educational nonprofit organizations, as well as cultural, social, trade, or religious nonprofits, formulate policies, provide advice, regulate conduct, and buy and trade goods and services across the country. For instance, organizations such as the National Geographic Society, the Sierra Club, the YMCAs, the National Multiple Sclerosis Society, the United Way, and the School of the Art Institute provide a wide variety of articles and services across state lines. See Edward J. Skloot, *Enterprise and Commerce in Nonprofit Organizations*, in *The Nonprofit Sector: A Research Handbook* 380, 381-83 (Walter W. Powell ed., 1987); Henry B. Hansmann, *The Role of Nonprofit Enterprise*, 89 *Yale L.J.* 835, 842 (1980); Evelyn A. Lewis, *When Entrepreneurs of Commercial Nonprofits Divorce: Is It Anybody's Business? A Perspective on Individual Property Rights in Nonprofits*, 73 *N.C. L. Rev.* 1761, 1771-72 (1995); Jon Anderson, *Art Institute Exhibit Brought Out Color of Monet*, *Chi. Trib.*, Dec. 7, 1995, at 1 (stating that the "Claude Monet: 1840-1926" exhibit of the Art Institute of Chicago drew 694,800 "out-of-towners," 125,450 of which were from foreign countries,

and had an economic impact similar to Chicago's major conventions); Leah Marcus, *Summer School Is a Hot Topic*, Chi. Sun-Times, May 2, 1995, at 3.

Moreover, the goods and services provided by nonprofit organizations in interstate commerce *do* have monetary value. Demand clearly exists for the goods and services nonprofits provide across state lines. In fact, nonprofits often "come into existence when for-profit firms and the government fail to meet the demands of certain groups in a particular market." Avner Ben-Ner, *Who Benefits from the Nonprofit Sector?: Reforming Law and Policy Towards Nonprofit Organizations*, 104 Yale L.J. 731, 734 (1994) (book review); see also Hansmann, *supra*, at 843-45. Nonprofits confer value by providing a number of important health, educational, scientific, social, religious, artistic, and cultural services. See generally Independent Sector, *Why Tax Exemption? The Public Service Role of America's Independent Sector* (1993); Gabriel Rudney, *The Scope and Dimensions of Nonprofit Activity*, in *The Nonprofit Sector: A Research Handbook* 55, 57 (Walter W. Powell ed., 1987); *Who Benefits from the Nonprofit Sector?* (Charles T. Clotfelter ed., 1992).³ Households are the major consumers of nonprofit services, accounting for approximately half of all sales; governments account for another 43 percent. Rudney, *supra*, at 62.

"Private nonprofit institutions account for a sizable and growing share of our nation's economic activity." Hansmann, *supra*, at 835. And "[t]he sectors in which

³ Nonprofits are often the forerunners in "risky but valuable activities" that for-profit businesses initially may avoid because low returns are predicted for such activities. Later, these activities may evolve into a new industry with for-profit businesses entering the market to provide such services as well. Evelyn A. Lewis, *When Entrepreneurs of Commercial Nonprofits Divorce: Is It Anybody's Business? A Perspective on Individual Property Rights in Nonprofits*, 73 N.C. L. Rev. 1761, 1805-06 (1995). For example, nonprofit organizations were the first to provide recycling services and home health care and now those industries are dominated by for-profit firms. *Id.*

these institutions are most common—education, research, health care, the media, and the arts—are vital elements in the modern economy." *Id.* Moreover, nonprofit organizations play "a dominant role in the health, social services, education, and high-culture industries." Ben-Ner, *supra*, at 736. To produce its goods and services, the nonprofit sector spends over \$389 billion each year in operating expenses—approximately seven percent of the gross national product. Virginia A. Hodgkinson et al., *Nonprofit Almanac 1992-1993: Dimensions of the Independent Sector* 20-21; see also Ben-Ner, *supra*, at 736; Independent Sector, *America's Independent Sector in Brief* 1 (1996). The education and research subsector alone spends over \$80 billion, close to 20 percent of the nonprofit sector's total expenditures, much of this in interstate commerce. See *America's Independent Sector in Brief*, *supra*, at 1. Nonprofit institutions receive \$90 billion in donations each year. Charles T. Clotfelter, *The Distributional Consequences of Nonprofit Activities*, in *Who Benefits from the Nonprofit Sector?* 1, 1 (Charles T. Clotfelter ed., 1992). Many nonprofit subsectors are "heavily dependent on fees by paying customers, with private payments accounting for at least half of total revenues." ⁴ Clotfelter, *supra*, at 6-7; see also Hansmann, *supra*, at 840-41. These expenditures and revenues cannot be ignored simply because the organizations generating this commerce do not operate for profit.

D. Not-For-Profit Organizations May Substantially Affect Interstate Commerce Within The Meaning Of The Commerce Clause In Its Dormancy.

In *United States v. Lopez*, 115 S. Ct. 1624 (1995), this Court reiterated that a wide variety of seemingly

⁴ The fees charged by these nonprofit organizations for services provided, such as hospital charges, tuition, and admission fees, of course do not cover the full costs. Gabriel Rudney, *The Scope and Dimensions of Nonprofit Activity*, in *The Nonprofit Sector: A Research Handbook* 55, 62 (Walter W. Powell ed., 1987). The remaining costs are recovered through various subsidies. *Id.*

intrastate economic activities "substantially affect" interstate commerce and are thus subject to Commerce Clause scrutiny. "Examples include the regulation of intrastate coal mining[,] *Hodel v. Virginia Surface Mining & Reclamation Ass'n, Inc.*, 452 U.S. 264 (1981)], intrastate extortionate credit transactions, *Perez v. United States*, 402 U.S. 146 (1971)], restaurants utilizing substantial interstate supplies, [*Katzenbach v. McClung* [379 U.S. 294 (1964)], inns and hotels catering to interstate guests, *Heart of Atlanta Motel v. United States*, 379 U.S. 241 (1964)], and production and consumption of home-grown wheat, *Wickard v. Filburn*, 317 U.S. 111 (1942)." 115 S. Ct. at 1630. Furthermore, the Court explicitly made clear that these examples were "by no means exhaustive." *Id.*

Nonprofit organizations generally, and petitioner in particular, substantially affect interstate commerce. *First*, nonprofit organizations use a substantial number of supplies and purchase goods and services from the stream of interstate commerce. *Second*, like local hotels and restaurants, many nonprofit organizations substantially affect interstate commerce by serving a large number of out-of-state consumers. Petitioner specifically provides camping and related services to a large number of beneficiaries who overwhelmingly come from out-of-state to receive those services.⁵ *Third*, nonprofits often employ workers to aid in the provision of their goods and services and that employment substantially affects interstate commerce. The nonprofit sector as a whole currently employs over ten percent of the nation's entire work force. Clotfelter,

⁵ Moreover, given the number of individuals who come to Maine to receive petitioner's services, petitioner substantially affects the interstate travel and transportation of persons, and thus interstate commerce. See *United States v. Lopez*, 115 S. Ct. 1624, 1629 (1995); *Heart of Atlanta Motel, Inc. v. United States*, 379 U.S. 241, 256 (1964); see also *Edwards v. California*, 314 U.S. 160, 172 (1941) ("transportation of persons is 'commerce'").

supra, at 1; Hodgkinson et al., *supra*, at 18. And, as of 1982, the nonprofit sector employs over fourteen percent of the nation's service sector work force. Rudney, *supra*, at 55-60. The education and research subsector alone employs over 20 percent of the nonprofit sector work force. *America's Independent Sector in Brief*, *supra*, at 1; Hodgkinson et al., *supra*, at 115. Moreover, the nonprofit sector generally "is highly labor intensive," with close to half of its current operating expenses being used to compensate employees. Hodgkinson et al., *supra*, at 113; see also Rudney, *supra*, at 57. Finally, nonprofits make a substantial contribution to the national economy. By 1990, nonprofits were providing 6.2 percent, or \$289 billion, of the national income. Hodgkinson et al., *supra*, at 17; Lewis, *supra*, at 1769.

Nonprofit organizations also provide a wide variety of articles and services across state lines to individuals, other nonprofit organizations, government entities, and for-profit businesses and often compete among themselves for funding, whether from consumers or donors. Jerald Schiff & Burton Weisbrod, *Competition Between For-Profit and Nonprofit Organizations in Commercial Markets*, in *The Nonprofit Sector in the Mixed Economy* 127, 127 (Avner Ben-Ner & Benedetto Gui eds., 1993); Richard Steinberg, *Nonprofit Organizations and the Market*, in *The Nonprofit Sector: A Research Handbook* 118, 130 (Walter W. Powell ed., 1987). These activities allow the nonprofit organizations to subsidize their efforts, a particularly important financial strategy given that traditional sources of publicly funded support are dwindling. Henry B. Hansmann, *The Two Nonprofit Sectors: Fee for Service Versus Donative Organizations*, in *The Future of the Nonprofit Sector* 91, 98-99 (Virginia A. Hodgkinson et al., eds., 1989); Schiff & Weisbrod, *supra*, at 127-28. While nonprofits do not participate in these activities for profit, they undeniably affect interstate commerce in a substantial way through their activities.

II. MAINE'S TAX LAW HAS MORE THAN A MERELY INCIDENTAL EFFECT ON NONPROFIT ACTIVITIES.

Exemptions from taxes are a government subsidy that is of great value to nonprofit institutions. In 1985 nonprofits generated an estimated \$110 billion in fee, sale, and investment revenues exempt from federal income taxes and held approximately \$300 billion in real property exempt from state and local property taxes. John G. Simon, *The Tax Treatment of Nonprofit Organizations: A Review of Federal and State Policies*, in *The Nonprofit Sector: A Research Handbook* 67, 67 (Walter W. Powell ed., 1987).

By denying a tax exemption benefit only to nonprofit organizations serving primarily out-of-state residents, Maine, and those states that inevitably would follow Maine's lead, severely hinder interstate commerce. The cost to interstate nonprofit organizations of providing goods and services will be greater than the cost to those nonprofit groups which provide goods and services predominantly intrastate. As a result, the amount of goods and services provided by interstate nonprofits will be reduced. Moreover, for petitioner and other nonprofits with a distinctively interstate clientele, providing services only to in-state residents would mean providing no services at all. In contrast, nonprofits that principally serve in-state individuals or organizations will continue to receive the state's subsidy of their intrastate activity.

This discrimination by the state of Maine entails precisely the kind of economic protectionism that the dormant Commerce Clause proscribes. See *Fulton Corp. v. Faulkner*, 116 S. Ct. 848, 853-54 (1996). Through its subsidization of nonprofit organizations that principally serve in-state interests, the state is manifestly preferring those organizations and aiding their economic development. Equivalent benefits are denied to other similarly situated nonprofit organizations simply because they are

engaged in interstate rather than intrastate commerce. In this case, the amount of subsidy is concrete. A nonprofit camp providing the exact same goods and services as petitioner but primarily to Maine residents would avoid paying property taxes amounting to \$36.64 per camper, almost 10% of the charged tuition. Pet. App. at 17a n.4. Maine's discriminatory property tax exemption is in direct violation of the dormant Commerce Clause. *Fulton Corp.*, 116 S. Ct. at 854.

* * * *

In sum, if the decision below holding that a state can deny otherwise available subsidies to nonprofit institutions based on whether the institution principally benefits out-of-state residents is upheld, a significant portion of interstate commerce and a substantial amount of not-for-profit commercial activity will be curtailed. If state and local governments are permitted to discriminate against interstate nonprofit organizations in their quest for new revenue sources, nonprofits benefitting out-of-state residents will be forced to operate at higher cost or to diminish services. Either option will put them at a competitive disadvantage *vis-a-vis* those nonprofit organizations that are exclusively intrastate in character, and will further hinder those for-profit businesses providing goods and services to interstate nonprofit organizations as well as the out-of-state consumers buying the goods and services of interstate nonprofits. Nonprofit organizations such as petitioner can avoid these harmful consequences only by desisting from their interstate activities. But the fundamental principle underlying the dormant Commerce Clause is the recognition of Congress's plenary authority to regulate interstate commerce. Maine's discriminatory tax exemption intrudes into Congress's exclusive domain and is therefore unconstitutional.

CONCLUSION

For the foregoing reasons, the Court should reverse the judgment of the Maine Supreme Judicial Court.

Respectfully submitted,

CARTER G. PHILLIPS
NATHAN C. SHEERS
MARISA A. GÓMEZ
SIDLEY & AUSTIN
1722 Eye Street, N.W.
Washington, D.C. 20006
(202) 736-8000

SHELDON ELLIOT STEINBACH *
AMERICAN COUNCIL
ON EDUCATION
One Dupont Circle, N.W.
Washington, D.C. 20036-1193
(202) 939-9355

Counsel for Amici Curiae

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* Counsel of Record